

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DENNIS SCRUGGS)
)
v.) NO. 3-13-0278
) JUDGE CAMPBELL
MICHAEL BRYSON)

ORDER

Pending before the Court are a Report and Recommendation of the Magistrate Judge (Docket No. 25), Objections filed by the Defendant (Docket No. 27), Objections filed by the Plaintiff (Docket No. 35), and an Amendment to Objections filed by Defendant (Docket No. 39).

Pursuant to 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b)(3) and Local Rule 72.03(b)(3), the Court has reviewed *de novo* the Report and Recommendation, the Objections, and the file. The Objections of the Plaintiff and the Objections of the Defendant are overruled, and the Report and Recommendation is adopted and approved.

The Court agrees that Plaintiff has failed to state a cognizable Eighth Amendment claim against Defendant Bryson. The Court cannot consider the Affidavits filed by the Plaintiff with regard to this claim because the pending Motion is a Motion to Dismiss, not a Motion for Summary Judgment.

With regard to the First Amendment retaliation claim, the Court cannot consider Plaintiff's Affidavit, as Defendant suggests, on a Motion to Dismiss. At this stage of the litigation, the Court may not consider additional evidence, so the Magistrate Judge's rejection of Defendant's *Heck v. Humphrey* argument is appropriate. In addition, whether Defendant's allegedly retaliatory action is

sufficiently severe to deter a person of ordinary fitness from exercising his First Amendment rights is generally a question of fact. *Bell v. Johnson*, 308 F.3d 594, 603 (6th Cir. 2002).

Accordingly, Defendant's Motion to Dismiss (Docket No. 19) is granted in part and denied in part. Plaintiff's Eighth Amendment claims are dismissed.

IT IS SO ORDERED.

Todd Campbell
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE